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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. GEORGE ALFARO, Defendant and Appellant.	B286714 (Los Angeles County Super. Ct. No. BA448030)

APPEAL from a judgment of the Superior Court of Los Angeles County, Edmund Willcox Clarke, Jr., Judge. Affirmed.

Mark R. Feeser, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb, Supervising Deputy Attorney General, Gary A. Lieberman, Deputy Attorney General, for Plaintiff and Respondent.

Defendant George Alfaro (defendant) appeals from a criminal judgment entered after a jury found him guilty of first degree residential burglary (Pen. Code,[1] § 459) and second degree robbery (§ 211). The charges were predicated on evidence that, in October 2015, defendant broke into the home of victim Carol Cortes (Cortes) and stole a television and cash, and later, in December 2015, robbed the same victim of her cell phone after punching her in the face. At sentencing, the trial court granted a defense motion pursuant to *People v. Romero* (1996) 13 Cal.4th 497 (*Romero*) and sentenced defendant to a total of 24 years in prison.

The parties are familiar with the facts, and our opinion does not meet the criteria for publication. (Cal. Rules of Court, rule 8.1105(c).) We accordingly resolve the cause before us, consistent with constitutional requirements, via a written opinion with reasons stated. (Cal. Const., art. VI, § 14; *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1261-1264 [three-paragraph discussion of issue on appeal satisfies constitutional requirement because "an opinion is not a brief in reply to counsel's arguments"; "[i]n order to state the reasons, grounds, or principles upon which a decision is based, [an appellate court] need not discuss every case or fact raised by counsel in support of the parties' positions"].)

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1. Defendant contends the prosecution engaged in misconduct during its rebuttal argument by urging the jury to

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[1] Undesignated statutory references that follow are to the Penal Code.

convict "based on societal concerns about bullying" and by asking the jurors "to abandon their role as neutral fact-finders and to act as '12 friends' of a bullying victim." "'The applicable federal and state standards regarding prosecutorial misconduct are well established. "'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."'" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves '"'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'" [Citations.]'" (*People v. Hill* (1998) 17 Cal.4th 800, 819.)

The prosecution's argument here is not like the arguments held improper in *United States v. Solivan* (6th Cir. 1991) 937 F.2d 1146 and *United States v. Sanchez* (9th Cir. 2011) 659 F.3d 1252. In these cases, the prosecutors urged the respective juries to consider how their verdicts would be viewed by others engaged in the same criminal conduct as the defendants. Here, by contrast (and as defendant concedes), "middle-school bullying is completely unrelated to the facts of this case." The prosecution never suggested convicting defendant of robbery would send a message to other potential robbers, let alone teenage bullies. Indeed, the prosecution specifically urged the jury to "tell the *defendant* that this behavior is unacceptable." (Emphasis ours.) That is not improper.

The issue is not as straightforward, however, with respect to the prosecution's exhortation that jurors view themselves as "12 friends" standing behind Cortes—a remark defendant understands as suggesting the jury abandon its role as a neutral

fact-finder. But there was no objection to this remark (nor a request that the jury be admonished), and the point is therefore forfeited.[2] (*People v. Winbush* (2017) 2 Cal.5th 402, 482; *People v. Williams* (2013) 56 Cal.4th 630, 671 ["'In order to preserve a claim of misconduct, a defendant must make a timely objection and request an admonition . . .'"].)

Anticipating the forfeiture, defendant argues his trial attorney's failure to object to the prosecutor's remark was constitutionally deficient. To prevail on an ineffective assistance of counsel claim, a defendant must demonstrate both "that counsel's representation fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694.) If the record on direct appeal "'sheds no light on why counsel acted or failed to act . . . ,'" a reviewing court must reject an ineffective assistance of counsel claim "'unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation.'" (*People v. Carter* (2005) 36 Cal.4th 1114, 1189; see also *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

Asking jurors to view themselves as the 12 friends of an alleged victim is not exactly a forbidden "Golden Rule" argument. (See, e.g., *People v. Vance* (2010) 188 Cal.App.4th 1182, 1193; *id.* at p. 1188 [Golden Rule arguments, in which "a prosecutor invites the jury to put itself in the victim's position and imagine what the victim experienced," are improper appeals to sympathy

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[2] Assuming we have discretion to excuse the forfeiture, we decline to exercise our discretion to do so.

for the victim].) But it is susceptible of being understood as a statement that improperly seeks to have the jurors become partisans for the victim, and it would have been better avoided for that reason.

That is not to say, however, that trial counsel for defendant could not have had valid reasons to refrain from objecting. Trial counsel may have believed the argument was not obviously improper and desired to avoid the risk that an objection to the remarks would be overruled, which might lend further credence to the prosecution's remarks in the minds of the jurors. Trial counsel might also have determined that the instructions given to the jurors before argument (e.g., to "*impartially* compare and consider all the evidence" (emphasis added)) were sufficient to inoculate the jury against treating the prosecutor's remarks as an invitation to decide the case as partisans for the victim. Because there are conceivable bases on which trial counsel may have properly decided not to object, defendant's ineffective assistance of counsel claim fails on direct appeal.

Furthermore, defendant also has not carried his burden to show there is a reasonable probability the jury would have come to a more favorable verdict if trial counsel had objected to the prosecution's rebuttal remarks. The instructions given to the jury for use in its deliberations stated jurors must not let "bias, sympathy, prejudice, or public opinion influence [their] decision" and emphasized the jurors' duty to be impartial judges of the facts. The instructions also specifically told the jurors to disregard any remarks by counsel that were contrary to the court's instructions. We presume the jury complied.[3] (*People v.*

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[3] Defendant makes much of the fact that the asserted misconduct came at the end of the prosecution's rebuttal

Pearson (2013) 56 Cal.4th 393, 434-435.) Furthermore, the potency of the prosecution's appeal to the jurors to view themselves as friends of Cortes and help her stand up to a bully rests largely on the jurors crediting Cortes's account of the December 2015 robbery. Defendant's argument at trial was not that Cortes misidentified defendant as the robber or somehow misunderstood the exchange, but rather that there was "no evidence beyond [Cortes's] bare statements, no police testimony to verify frankly that this matter even happened . . . ." If it were undisputed that *someone* robbed Cortes but there was reason to doubt whether it was defendant, it is possible an appeal to the jurors' sympathy for Cortes might cause them to convict where they otherwise would not. But here, where defendant took the position that Cortes fabricated the robbery, the prosecution's appeal to the jurors' sympathy would only find purchase (if at all) if the jury had already determined Cortes was credible.

2. At defendant's request, we have reviewed the record of the in camera proceedings pertaining to defendant's motion for discovery under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531. The record made by the trial court suffices to permit review, and

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argument, making it "the last thing the jury heard" with no opportunity for the defense to respond. That is not quite right. The trial court delivered post-argument instructions to the jury, including an instruction telling the jury that its "role [was] to be an impartial judge of the facts, not to act as an advocate for one side or the other." This effectively served as an admonition that came shortly after, and was directly responsive to, the improper meaning defendant ascribes to the prosecution's rebuttal remarks—and the admonitory instruction, not the rebuttal argument itself, was the last thing the jury heard.

the trial court did not abuse its discretion in concluding there was no material that should be turned over to the defense.

3. When the trial court sentenced defendant, imposition of a section 667, subdivision (a)(1) five-year enhancement for sustaining a prior serious felony conviction was mandatory. (Former § 1385, subd. (b) ["This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667"].) A recent legislative change, however, deletes the provision of section 1385 that makes imposition of a section 667 prior serious felony conviction enhancement mandatory (and related language in section 667 itself), thereby permitting trial courts to strike such enhancements when found to be in the interest of justice. (Sen. Bill No. 1393 (2017-2018 Reg. Sess.) §§ 1, 2.)

All concerned agree that the change in law worked by Senate Bill 1393 applies retroactively to defendant under the principles espoused in *People v. Francis* (1969) 71 Cal.2d 66 and *In re Estrada* (1965) 63 Cal.2d 740. But we agree with the Attorney General that a remand to allow the trial court to consider exercising its newly-conferred discretion would be pointless. The trial court expressly stated it agreed to grant defendant's *Romero* motion, which avoided an indeterminate Three Strikes sentence, only because the court was satisfied the maximum determinate sentence it could impose—which included both of the section 667, subdivision (a)(1) enhancements—was sufficient punishment for the crimes of conviction. With this rationale preserved on the record, there is no reason to remand the matter. (See *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896.)

DISPOSITION

The judgment is affirmed.

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BAKER, Acting P. J.

We concur:

MOOR, J.

SEIGLE, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.